**U.S. Department of Labor**

**Board of Alien Labor Certification Appeals**
**800 K Street, NW, Suite 400-N**
**Washington, D.C. 20001-8002**

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Date: April 23, 1998

CASE NO.: **97 INA 311**

In the Matter of:

**FOX & FOWLE ARCHITECTS, P.C.,**
Employer

on behalf of

**SADIG ABBAS ABDUL-KADIR,**
Alien

Before : Huddleston, Lawson, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

# DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of SADIG ABBAS ABDUL-KADIR ("Alien") by FOX & FOWLE ARCHITECTS, P.C., ("Employer") under § 212 (a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) ("the Act"), and regulations promulgated thereunder at 20 CFR Part 656. After the Certifying Officer ("CO") of the U.S. Department of Labor at New York, New York, denied the application, the Employer appealed pursuant to 20 CFR § 656.26.[1]

*Statutory Authority*. Under § 212(a)(5) of the Act, an alien seeking to enter the United States to perform either skilled or unskilled labor may receive a visa, if the Secretary of Labor has decided and has certified to the Secretary of State and to the Attorney General that (1) there are

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means to make a good faith test of U.S. worker availability.

## STATEMENT OF THE CASE

On November 17, 1994, the Employer applied for alien labor certification on behalf of the Alien to fill the position of Project Manager in the Employer's Architectural Firm. AF 06. The Employer described the job duties as follows:

> Develops design proposals for local and international projects utilizing research results prepared by junior architects and researchers. Monitors preparation of design, profitability of project for compliance to budget, compliance of work to schedule and progress of work team. Directs efforts to comply with codes, owners standards and programmatic requirements. Oversees production of documents. Supervises and teaches junior architects a variety of skills. Engages in design of high rise architectural projects including building lobbies, custom millwork and stonework. Prepares design work on the basis of material submitted by junior architects using physical modelling, hand drawing and rendering and 3-D computer modelling. coordinates with work of consultants. Utilizes Autocad release 12, Lotus, Excel, Pagemaker and Coreldraw to prepare project designs and presentations. Utilizes Condoc procedures and architectural photography techniques. Applies NYC zoning laws, building & lifesafety codes. Conducts complex research. Responsible for complying with budgets.

Employer's Special Requirements were a baccalaureate degree in Architecture, plus one year of experience in the Job Offered or three years of experience in the Related Occupation of Project Architect/Junior Architect. The Employer's Other Special Requirements were the following:

> Must have 2 years experience in designing proposals in Autocad 11 and 12 including use of paperspace and modelspace modes, use of CONDOC procedures, knowledge of Coreldraw and Pagemaker as well as LOTUS and EXCEL programs. Must have completed course in photography or architectural photography. Knowledge of NYC zoning laws, building and life safety codes. Must meet company's design standards.

The Employer proposed to pay $35,000 per year for a forty hour week from 9:00 AM to 5:00

PM. AF 06.[2] The job was classified as ARCHITECT under DOT Occupational Code No. 001.061-010. None of the thirteen U. S. workers who applied for the position was hired. AF 165

**Notice of Findings**. Subject to the Employer's rebuttal under 20 CFR § 656.25(c), the CO denied certification in the Notice of Findings ("NOF") on May 8, 1996. AF 167-172.

1. Unless demonstrated to arise from business necessity, 20 CFR § 656.21(b)(2) requires the Employer to establish that its hiring criteria for this position are the normal requirements for its performance in the United States and are encompassed by the description of the job in the Dictionary of Occupational Titles[3] ("DOT"). In examining its requirements for the position of Architect (Project Manager), the CO observed that even though Employer does not list any Special requirements, it did require experience in twelve specific skills and working tools: 3-D computer modeling, Autocad release 12, Lotus, Excel, Pagemaker, Coreldraw, the use of Condoc procedures, and architectural photograph techniques, and the application of NYC zoning laws, and building and safety codes. The CO said Employer's requirement for experience in all of the skills listed was "unrealistic and restrictive." The CO then observed that the circumstance that the Employer may use these skills was not sufficient to demonstrate their business necessity without more. Moreover, said the CO, if the Employer failed to prove that it normally requires such skills, it could be found to have based its hiring criteria on Alien's current qualifications, noting that the Alien appeared to have learned each of the listed skills while working for the Employer in entry level positions.
Setting out the steps the Employer was directed to follow to rebut this finding, the CO then gave the Employer the choice of either amending or deleting these restrictive requirements or of proving their business necessity. The CO pointedly advised the Employer that it would not be permitted to elect both responses.

2. Observing that 20 CFR § 656.20(c)(8) requires that the job offered be "clearly open" to any qualified U. S. worker, the CO then noted that 20 CFR § 656.21(b)(2)(ii) provides that a U. S. worker is considered able and qualified for the job if the worker's education, training, experience, or a combination of these factors enables the worker to perform in a normally acceptable manner the duties of the occupation as it customarily is performed by other workers similarly employed. In addition the CO added that 20 CFR § 656.21(b)(6) provides that U. S. workers who apply for a position offered to the alien may only be rejected for reasons that are lawful and job related. As the Employer had rejected all of the thirteen candidates whose resumes were sent to the Employer following the publication of the availability of this job, the CO found that the rejections of Leis Moreno, Christine Balint, Richard H. Talbert, Glenn R. Urbanas, and Robert Bedener were based on a perceived lack or experience in one of more of the job duties and

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[2]The Employer discussed the content of some of the duties in a letter responding to an inquiry by the State Department of Labor. AF 37-46.

[3]Administrative notice is taken of the Dictionary of Occupational Titles (DOT), published by the Employment and Training Administration of the U. S. Department of Labor.

on job requirements. Because all of the job applicants were qualified by their resumes, the CO said this application did not comply with 20 CFR §§ 656.20(c)(8), 656.21(b)(2)(ii), and 656.21(b)(6).

3. Finally, the CO questioned the good faith of Employer's recruitment under the Act and regulations in that it failed to explain the reason for its failure to contact Mr. Urbanas until October 18, 1995, a date long after it received his resume.

**Rebuttal**. Employer's June 16, 1996, rebuttal addressed the issues stated in the NOF. AF 173-281. Arguing that the job duties conform to the DOT, Employer argued that each of the skills its application listed was "relevant" and conformed to its business necessity, that the position was "not 'tailormade,'" that some of the requirements were based on statutes, and that one required skill was "a normal industry wide standard." AF 280. Employer argued that its evidence supported the inference that even though the Alien gained his qualifying experience while he was its employee, he then was working in a "lesser position" of "sufficiently dissimilar scope and responsibility, citing **Bent Wood Products, Inc.**, 88 INA 259 (Feb. 28, 1989)(*en banc*), and **Delitzer Corp., of Newton**, 88 INA 482(May 9, 1990). Employer next argued that it is not feasible to train an individual with less experience for this position, saying this could take as much as one year, that it would be too costly to defeat its purpose, "to maximize profits," and that it could not spare the services of other staff to accomplish the training.

Employer contended that its evidence demonstrated that the hiring criteria specified in its application were its minimum requirements for the job under 20 CFR § 656.21(b)(6), arguing that they are not unduly restrictive and arise from business necessity, bear a reasonable relationship to the occupation "in context to employer's business," and are essential to perform the job duties its application described. (Emphasis as in original.) The Employer represented that its evidence supported an inference that the required skills would take a worker"a substantial period of on the job training" and were essential to a worker's capacity to perform the job duties and function in the position. The Employer reiterated that it did not have a duty under the regulations to train this worker for "an extensive period of time." Finally, the Employer argued that it had recruited in good faith and that it rejected applicants for reasons that were lawful and job related.

**Final Determination**. The CO denied certification in the Final Determination issued on July 17, 1996.[4] Noting Employer's amendments to its application, the CO said the NOF finding on the issues as to restrictive requirements applied to qualified job applicants remained unchanged, and the denial of certification was based on those issues. In restating the NOF finding that the requirement of experience in twelve specific job skills was restrictive, and that the Alien appeared to have learned each of those skills on this job in entry level positions while working for the Employer, the CO concluded that the Employer's rebuttal evidence was not persuasive. The

[4]The CO took note of the deletions of the Related Occupation and Item #15 from the Form ETA 750A by Employer's amendment of May 5, 1995, observing that the May 8, 1996, findings were addressed to Employer's representations in Item # 13, only. AF 286.

CO referred to an affidavit that said, "None of the software packages listed, like Lotus, Excel, PageMaker, and CoreDraw need any special training" and commented that this architect then added that the Employer's criteria refer to "off-the-shelf, prepackaged software that are easy to learn and are usually part of the standard fare offered at computer labs at most universities." In comparing the qualifications of Employer's experts to the qualifications of the Alien the CO was not persuaded by evidence that the architects who furnished these affidavits had these skills, since all of them had a higher level of experience than the Alien.[5] The CO said the Employer failed to sustain its burden of proof that the specified skills were the minimum requirements for the job offered under 20 CFR § 656.21. The CO also concluded that the Employer failed to rebut the NOF finding under 20 CFR § 656.24(b)(2)(ii), which required the CO to consider the above named U. S. workers to be able and qualified for the job, as unrebutted evidence in their resumes showed that each of them had sufficient education, training, experience, or a combination of such factors to perform in the normally acceptable manner the duties involved in this occupation as it customarily is performed by other workers similarly employed.

Again citing 20 CFR §§ 656.20 c)(8) and 656.21(b)(6), the CO reviewed the evidence as to Mr. Moreno, Ms. Balint, Mr. Talbert, Mr. Urbanas, and Mr. Bedener, noting *inter alia*, that Mr. Urbanas was not contacted by the Employer until October 18, 1995.[6] The CO said that even though Mr. Moreno had twenty years of experience that included three years as a Senior Project Manager and three years as a Senior Project Architect, Ms. Balint had nine years of experience that included five years of experience in project management of jobs in New York and New Jersey, Mr. Talbert has a baccalaureate and a Master's degree in architecture and two years of experience as project manager, and Mr. Urbanas' experience included five years of experience in architectural project management and design, the Employer dismissed all of them as unqualified for this position in one or more the specified job duties.

The NOF required the rebuttal discussed above because this rejection was not accepted as valid and the *bona fides* of Employer's recruiting effort was questioned, said the CO. After recognizing AutoCAD as a minimum requirement after examining the Employer's rebuttal, however, the CO accepted the rejection of Mr. Moreno, but again found that the other four applicants were qualified in the Final Determination. The CO concluded that the Employer's pattern of recruitment failed to sustain its burden of proving good faith recruitment in that it did not contact and interview the applicants in a timely manner and it rejected applicants on the basis of hiring criteria that Employer failed to prove to be its minimum requirements for the position. For these reasons, the CO concluded that certification must be denied.

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[5]Mr. Griggs also had six years of professional experience and a Master's degree.

[6]This omission was particularly relevant because Mr. Urbanas had a baccalaureate degree in Architecture; fifteen years of construction engineering and architectural experience; five years of experience in architectural project management and design; two years of experience in corporate facilities management; knew AutoCAD, Wordperfrect, DOS, and Windows.

**Appeal**. On August 12, 1996, the Employer moved to reopen and reconsider the CO's denial of this application for alien labor certification. AF 288-491. As the Employer further moved that this motion be treated as an appeal to BALCA, if it was denied, the CO duly referred the matter on March 12, 1997, as requested. The motion to reopen and reconsider was denied. The CO explained that, "Motions for reconsideration will be entertained only with respect to issues which could not have been addressed the rebuttal," citing **Harry Tancredi**, 88 INA 441 (Dec. 1, 1988)(*en banc*). The CO concluded that, "Since the present motion does not raise such matters it is denied."[7]

## Discussion

The Employer's motion to reopen and reconsider the Final Determination appears to state its reasons for appeal. The Employer's arguments are addressed to the CO's construction of the evidence presented in this record, contending that its stated hiring criteria are the minimum requirements for the position at issue. The Final Determination indicates that while the CO did accept most of the stated requirements, including AutoCAD, it was found that several qualified job applicants were rejected by the Employer.

Having stated a lengthy series of specific job requirements, the Employer admitted that the Alien's facility in these skills was acquired while working in its business, and argued that his entry level positions were sufficiently dissimilar from the job at issue to meet the criteria of **Delitizer Corporation of Newton**, 88 INA 482 (May 9, 1990)(*en banc*), and other decided cases. The Employer's thesis is that the Alien gained the knowledge of architectural software while performing other duties for the Employer.

In **Delitizer** BALCA explained that the employer's burden is to prove the "dissimilarity" of the position offered from the job in which the alien gained the restrictive experience but, added the Board, while a comparison of the job duties is relevant, such a distinction is not the sole consideration. The Board also said that 20 CFR § 656.21(b)(5) gives the CO "broad discretion" to determine the similarity or dissimilarity of the two positions at issue. This Employer has cited the following as the bases on which it distinguished between the two positions Alien held in the Employer's firm: (1) a higher salary is being paid to the Alien as Project Manager than Employer paid Alien as a Project Architect/ Junior Architect; (2) their titles are different; (3) the responsibilities of the Project Manager require the Alien to supervise workers in Alien's former position as Project Architect /Junior Architect; (4) the Project Manager occupies a higher level than the Project Architect/Junior Architect in Employer's hierarchy; (5) as a Project Manager the

[7]Employer argued that it did not intend to delete so much of Item #14 as discussed a "Related Occupation" and parts of Item #15. While any confusion that such interlineation caused was the result of Employer's alteration of the Form 750A that it resubmitted, nothing has been pointed out that suggests that the misunderstanding it created altered any material finding of the CO in either the NOF or the Final Determination. As the circumstances Employer now alleges were not a sufficient reason to reopen or to reconsider the Final Determination, the panel affirms the denial of reconsideration and will consider the issues resolved in the Final Determination as presented in this appeal.

Alien has new and added responsibilities that include budgeting; (6) the Alien's new job as Project Manager involves training junior architects.

The criteria on which Employer relied to differentiate between the Alien's past and present positions are less impressive, however, when it is recalled that at least four of most of the candidates the Employer rejected had worked as Project Managers for other prominent architectural firms for more than two years, and that their routine duties were the very elements that it now cites as the points of dissimilarity between the Alien's old position and the job to which Employer promoted him shortly before filing this application.

The Alien's new position is clearly a promotion from Project Architect/Junior Architect to Project Manager within Employer's hierarchy, since the Alien acquired all of the requisite skills while working as a Project Architect/Junior Architect in the Employer's firm immediately before he became a Project Manager. Based on Employer's arguments and the large number of highly specific skills necessary to be hired as a Project Manager, we infer that the only way to qualify as a Project Manager in this Employer's architectural firm was to be a Project Architect/Junior Architect who had used the equipment, software and other processes common to the Employer's own business that it specified as special requirements in this application. This fits the holding in **Delitzer**, where the Board found that the employer required experience in the "lesser" job to qualify for the "greater" position offered in the application for certification.

While this Employer may require its Project Manager to use the special skills it listed, the rebuttal evidence discussed above does not persuade the panel that these are the minimum qualifications to perform this job in the context of this profession as it is practiced in the place where this job is offered. The qualifications of this Alien would not have met the Employer's criteria but for his entry level apprenticeship in the lower levels of this firm.
For this reason it is appropriate to consider that 20 CFR § 656.21(b)(5) requires that the hiring criteria an employer may require of U. S. workers shall not be greater than it demands of the alien. Moreover, **Jackson and Hull Engineers**, 87 INA 547 (Nov. 24, 1987)(*en banc*), held under 20 CFR § 656.21(b)(6) that an employer must prove that it has not hired workers with less training or experience for the job at issue or for similar positions. The CO found in the instant case, however, that this Employer's rebuttal had only showed that its project managers actually used the special skills that it made job requirements in its application, but had failed to prove that such skills were a minimum requirement to qualify to be hired for the job at issue. Employer's evidence shows that the position offered in this case is a progression from the entry level at which the Alien was hired by this firm, rather than a job that is clearly open to any U. S. worker, since the particular combination of the skills required could only be acquired by having worked for the Employer in the past. The very qualifications of the U. S. job applicants is persuasive evidence that other firms in the same profession do not require all of the special skills the Employer chose to list.

While an employer may adopt any qualifications it may fancy for the workers it hires in its business, when an employer seeks to apply restrictive qualifications in weighing the applications

of U. S. job seekers while testing the labor market for alien labor certification its job criteria are limited. 20 CFR § 656.21(b)(5) requires an employer to prove that its hiring qualifications for the position offered are its actual minimum requirements for the job, that it has not in the past hired workers with less training or experience to perform work similar to duties of the position at issue, and that it is not possible for the employer to hire workers with less training or experience than is normally required by this job. This Employer's rebuttal did not prove that its hiring qualifications for the position offered are its actual minimum requirements for the job. The history of this Employer's having hired and promoted the Alien contradicts any possible proof that it has not in the past hired workers with less training or experience to perform work similar to job duties of the position at issue.

As the Employer did not deny that the Alien's experience in the use of Autocad 11 and 12 including use of paperspace and modelspace modes, CONDOC procedures, Coreldraw, Pagemaker, LOTUS, EXCEL programs was acquired while in its employ, this finding by the CO is affirmed as based on sufficient evidence. Since the greater weight of evidence confirms that this position is a promoted one--from Project Architect/Junior Architect to Project Manager, we also affirm that the only way to qualify as Project Manager in this Employer's firm was to be a Project Architect/Junior Architect who had used the equipment and other processes the Employer specified as special requirements. Consequently, **Delitizer** did not apply in this case, since this Employer's restrictive job requirements limited competition for the position to workers whose experience was gained by using the specified equipment in the Employer's own firm, a criterion that is in consistent with 20 CFR §§ 656.21(b)(2)(i)(A) and (B).

Since § 656.21(b)(5) requires an employer to show that the qualifications in its application represent its actual minimum requirements for the job, we affirm the CO's finding that this Employer failed to establish that it is not feasible to hire a U. S. worker without the restrictively required job experience and that the CO's conclusion was based on sufficient evidence. See **Jackson and Hull Engineers**, supra. Consequently, it follows that the CO correctly found that the Employer rejected the U. S. job applicants for reasons that were neither lawful nor job-related.

Accordingly, as sufficient evidence of record supported the denial of certification, the following order will enter.

## ORDER

The Certifying Officer's denial of labor certification is hereby Affirmed.

For the Panel:

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FREDERICK D. NEUSNER

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW**: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.